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May 22, 2017

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U.S. EPA Region 10
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RECEIVED ON:

MAY 25 2017
ORC
EPA Region 10
Office of the Regional Administrator

Re: *City of Seattle v. Monsanto Company, et al.*, U.S. District Court, Western District of Washington, Case No. 2:16-cv-00107-RSL

Dear Mr. Sessions, Mr. Pruitt, and Ms. Pirzadeh:

Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") Section 113(l) and the Clean Water Act ("CWA"), 40 C.F.R. 135.4, enclosed please find a copy of the CERCLA and CWA counterclaims filed against the City of Seattle by Monsanto Company, Pharmacia LLC, and Solutia Inc., in the above-referenced litigation. The counterclaims were filed today, May 22, 2017.

Very truly yours,

Andrea M Hogan

Andrea M. Hogan
of LATHAM & WATKINS LLP

Enclosure

cc: Robert M. Howard
Molly Jones, Monsanto Company
Jennifer Campbell, Schwabe Williamson & Wyatt

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE, a municipal corporation, located in the County of King, State of Washington,

Plaintiffs

v.

MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA CORPORATION, and DOES 1 through 100,

Defendants.

CASE NO. 2:16-cv-00107-RSL

DEFENDANTS'/ COUNTER-CLAIMANTS' MOTION FOR LEAVE TO AMEND ANSWER AND COUNTERCLAIMS

NOTED ON MOTION CALENDAR:
June 9, 2017

File Date: January 25, 2016
Trial Date: April 2, 2018

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL RULES AND REGULATIONS

STATE RULES AND REGULATIONS

OTHER AUTHORITIES

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I. INTRODUCTION

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, Defendants/Counter-Claimants ("Defendants") respectfully request leave to amend their Answer and Counterclaims. A copy of the proposed First Amended Answer and Counterclaims is attached as Exhibit A, and a redline is attached as Exhibit B. The proposed amendment seeks to add claims previously identified in Defendants' original Answer and Counterclaims, which were subject to statutory notice and claim-presentment requirements. *See* Dkt. No. 63 at ¶¶ 25-28. It also supplements the factual allegations in support of Defendants' CERCLA claims and adds detail about the response costs that Defendants have incurred and the necessity of such costs. Finally, the amendments add one affirmative defense.

Where, as here, a request for leave is brought in good faith and without improper purpose, leave is to be "freely given," *Foman v. Davis*, 371 U.S. 178, 182 (1962), a "policy [that] is 'to be applied with extreme liberality,'" *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citation omitted). For that reason, "[c]ourts may decline to grant leave to amend only if there is strong evidence of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment, etc.'" *Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (citation omitted).[1]

As an initial matter, Defendants have not previously amended their Answer and Counterclaims, and leave to do so is appropriate to implement the Ninth Circuit's directive that parties should generally be given at least once chance to do so where, as here, the amendment is not futile.[2]

Moreover, there is no evidence—let alone strong evidence—of the factors that weight against amendment here. This motion is brought in good faith and without dilatory motive, so neither of

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[1] *Accord United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011) (Courts are to consider five factors in granting leave to amend a complaint: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the complaint has previously been amended). The same standard of Rule 15(a) applies to requests for leave to amend answers/counterclaims and complaints. *See, e.g., C.F. v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir. 2011).

[2] *See, e.g., Eminence Capital*, 316 F.3d at 1051-52.

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those two factors even conceivably applies.

Nor has there been any undue delay. Defendants bring this request more than four months prior to the October 4, 2017 deadline for amending pleadings under the governing scheduling order. *See* Dkt. No. 40 at 1. Moreover, Defendants bring this request to add the Clean Water Act ("CWA") and state law claims on the *first possible date* after the applicable 60-day CWA and state law notice periods have run.

The City also will not suffer prejudice from this request. The City has had notice of the proposed CWA and state law claims since March 23, 2017, and will have (and has had) ample opportunity to prepare its defense of those claims. Because of that notice and the early stage of this case, there is no potential prejudice.

For all of these reasons, Defendants' request for leave should be granted.

II. ARGUMENT

A. Leave Is Appropriate Under Ninth Circuit Precedent Providing at Least One Opportunity to Amend

The Ninth Circuit has long made clear that parties should be granted at least one opportunity to amend their pleadings unless the proposed amendment is futile: "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Capital*, 316 F.3d at 1052. Indeed, "leave to amend should be granted if it appears *at all possible* that the plaintiff can correct the defect." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citation omitted) (emphasis added).

Defendants have not yet had a chance to assert their CWA and state law claims—let alone a chance to amend them to address any deficiencies identified by the Court. Leave is thus particularly appropriate so that Defendants are given an opportunity to adjudicate those claims in this action, which will promote judicial economy. (In contrast, denial of leave would pointlessly force Defendants to file a separate suit raising their CWA and state law claims, resulting in parallel and inefficient proceedings.) Leave to amend is appropriate where a party was subject to a notice period in order to bring its claims. *See, e.g.*, *Caswell v. Calderon*, 363 F.3d 832, 839-40 (9th Cir. 2004) (reversing denial of request for leave to add new claims once they were exhausted as an abuse of

discretion).

Defendants also propose amendments in order to add detail to certain factual allegations describing the necessary response costs incurred by Defendants supporting their CERCLA claims. *See* Redline of Proposed First Amended Answer and Counterclaims ¶¶ 1, 19, 23, 43, 44, 46, 48-50, 52-54, 141-143 (Ex. B). Defendants also propose the addition of one affirmative defense. *See id.*, Sixty-First Affirmative Defense (Ex. B). These minor amendments add additional detail relevant to Defendants' CERCLA claims, including but not limited to additional factual allegations to address the arguments raised in Plaintiff's Motion to Dismiss (Dkt. No. 40). While Defendants believe that the allegations supporting their original CERCLA claims were more than sufficient to meet the pleading standards of the Federal Rules, Defendants have added these additional factual allegations in an abundance of caution and in the interest of conserving the Court's and the Parties' resources. *See Vecchio v. Amazon.com*, No. C11-0366RSL, 2011 WL 13101825, at *1 (W.D. Wash. July 8, 2011) ("granting leave to amend will ultimately conserve resources because the parties will not be required to further brief the pending motions to dismiss and the Court will not be required to consider motions that may, at least in part, become moot in light of the proposed amendments"); *Kroeber v. GEICO Ins. Co.*, No. C14-726RSL, 2015 WL 11669649, at *3-4 (W.D. Wash. Mar. 31, 2015) (granting plaintiff leave to amend where defendant had filed a motion for summary judgment).

As set forth in Defendants' Motion to Stay Briefing on Plaintiff's Motion to Dismiss and accompanying Reply (Dkt. Nos. 73, 74), granting a stay on briefing Plaintiff's pending Motion to Dismiss and allowing Defendants leave to amend will greatly conserve both the Parties' and the Court's time and resources because the Parties will avoid duplicative briefing on many of the same issues and the Court will avoid deciding certain issues that may become moot in light of Defendants' amendments.

B. There Was No Undue Delay in Seeking Leave

This request for leave is also timely. There is accordingly no strong evidence of undue delay that could justify a denial of leave for three reasons.

First, this request is made *over four months* before the current October 4, 2017 deadline for seeking leave to amend pleadings. *See* Dkt. No. 40 at 1. This Court and other courts in this District

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have repeatedly recognized there is no undue delay when a request for leave is brought before the deadline established by the governing scheduling order. *See*, *e.g.*, *Kroeber*, 2015 WL 11669649, at *3 (no undue delay where "[p]laintiff's motion for leave to amend was filed prior to the deadline for amending pleadings and prior to the discovery deadline"); *MidMoutain Contractors, Inc. v. Am. Safety Indem. Co.*, No. C10-1239JLR, 2013 WL 12116509, at *3 (W.D. Wash. May 7, 2013) (no undue delay where "motion to amend comes before the deadline for amended pleadings, before the close of discovery, and before the dispositive motions deadline"); *Manchester v. Ceco Concrete Const., LLC*, No. C13-832RAJ, 2014 WL 6684891, at *2 (W.D. Wash. Nov. 24, 2014) (no undue delay where motion to amend "was brought prior to the court's deadline for amendment of pleadings").

Second, Defendants' request for leave to add their CWA and state law claims is brought on the very first possible date following the exhaustion of applicable statutory notice and Washington claim-presentment requirements. As described above, the Ninth Circuit has made clear that time spent exhausting pre-claim procedural requirements is not undue delay. *Caswell*, 363 F.3d at 839-40. Defendants provided notice of the alleged violations of the CWA and their intent to file suit to the U.S. Attorney General, Administrator of the EPA, Administrator of EPA Region X, the Washington Department of Ecology, and the City on March 23, 2017, pursuant to 33 U.S.C. § 1365(b)(1)(A). *See* Ex. C. Similarly, on March 23, 2017, Defendants presented their state law negligence, unjust enrichment, and contribution claims to the City, pursuant to RCW 4.96.020. *See* Ex. D. The 60-day periods prescribed by both 33 U.S.C. § 1365(b)(1)(A) and RCW 4.96.020(4) expired on May 22, 2017. Because Defendants filed this Motion to Amend on the first day that it was possible to do so under the applicable notice periods, it cannot reasonably be considered undue delay.

C. There Is No Prejudice to the City

The City also will not suffer any prejudice from granting this request for leave. In this context, prejudice is "undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party." *Wizards of the Coast LLC v. Cryptozoic Entm't LLC*, 309 F.R.D. 645, 652 (W.D. Wash. 2015). No such difficulty is present here.

This request for leave is brought at the early stages of this case, where discovery is ongoing

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and the fact discovery cutoff is more than six months away on December 3, 2017. *See* Dkt. No. 40 at 1. Courts frequently hold that there is no prejudice where the motion for leave was brought before the discovery cutoff. *See, e.g., DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187-88 (9th Cir. 1987) (reversing denial of leave to file a fourth amended complaint where the "case [was] still at the discovery stage").

In addition, the City has long had effective notice of the claims that Defendants seek to add. Virtually all of the factual allegations supporting Defendants' CWA and state law claims were present in Defendants' original Answer and Counterclaims filed on March 24, 2017, along with an explicit statement that Defendants intended to add such claims once the applicable notice and claim-presentment periods had run. *See* Dkt. No. 63 at ¶¶ 25-28. In addition, the City had notice of the substance of these claims from Defendants' CWA 60-day notice[3] and state-law presentment form, both of which were provided to the City on March 23, 2017. *See* Exs. C & D. The City thus cannot claim prejudice from the delay in formal assertion of the claims it has long known are coming. *See Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986) (denial of leave to amend was an abuse of discretion where the "facts [on] which [the claims depended] are well known to the parties and which were pleaded at the outset," and the amendment only added a new legal claim based on the same facts); 3-15 Moore's Federal Practice - Civil § 15.15 ("Whether a defendant would be prejudiced by a 'new' theory of recovery does not depend on whether the earlier pleading formally pleaded the theory, but on whether the earlier pleading put defendant on sufficient notice of the potential claim.").

The City thus will not suffer any prejudice from this request.[4]

III. CONCLUSION

Defendants respectfully request that this Court grant Defendants' motion for leave to amend their answer, affirmative defenses, and counterclaims.

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[3] Defendants' 60-day notice explained in detail the City's extensive violations of the CWA, including combined sewer overflows discharging raw, sewage, wastewater, and storm water discharges containing PCBs, discharges not in compliance with water quality standards, and the City's own use of PCB-containing products.

[4] Notably, the City bears the burden of proving such prejudice with strong evidence. *DCD Programs*, 833 F.2d at 187; *supra* at 1-2.

Dated: May 22, 2017

SCHWABE WILLIAMSON & WYATT

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THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CITY OF SEATTLE,

Plaintiff,

v.

MONSANTO COMPANY, *et al.*,

Defendant.

Case No. C16-107-RSL

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO AMEND ANSWER AND COUNTERCLAIMS

NOTED FOR HEARING: JUNE 9, 2017

THIS MATTER comes before the Court upon Defendants' Motion to Amend Answer and Counterclaims. The Court being fully advised and having specifically reviewed the following:

1. Defendants' Motion to Amend Answer and Counterclaims, and exhibits attached thereto,

2. Plaintiff's opposition, if any; and,

3. Defendants reply, if any.

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The Court, having considered the submissions, HEREBY ORDERS, ADJUDGES, AND DECREES THAT Defendants' Motion to Amend Answer and Counterclaims is GRANTED.

Dated this ____ day of _____, 2017.

_____
HONORABLE ROBERT S. LASNIK

Presented by:

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I hereby certify that on May 22, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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